The 1996 legislation explicitly retains this structure. An examination of the interconnection provisions of the Telecommunications Act of 1996[14] reveals that the 1993 legislation governs the LEC to CMRS interconnection compensation relationship. Specifically, Section 251 contains a Section 201 savings clause[15] which preserves the Commission's authority to govern LEC to CMRS interconnection.[16] Moreover, state authority under Section 252 to review and approve interconnection agreements is expressly conditioned,[17] in part, by Section

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[14] 47 U.S.C. § 251 (regarding LEC obligations to unbundle their networks and to provide interconnection to competitors); § 252 (requiring state approval of interconnection agreements).

[15] Section 251(i) states that "[n]othing in [Section 251] shall be construed to limit or otherwise affect the Commission's authority under section 201." 47 U.S.C. § 251(i).

[16] Section 332(c)(1)(B) specifically acknowledges and preserves this authority ("[u]pon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this Act.") 47 U.S.C. § 332(c)(1)(B).

[17] *See, e.g.*, 47 U.S.C. § 252(e)(3) ("Notwithstanding paragraph (2), ***but subject to section 253***, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.") (emphasis added); *see also*, 47 U.S.C. § 252(f)(2).

253 of the Act.[18] Importantly, Section 253(e) states that "[n]othing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers."[19] Thus, state approval under Section 252 is made subject to the state preemption provisions of Section 332.[20]

Viewed generally, the 1993 legislation already performs the functions intended by Congress in enacting Sections 251 and 252, that is, to adopt regulatory policies designed to foster the development of competition in telecommunications. Efforts to graft the 1996 interconnection provisions onto the LEC/CMRS relationship will serve only to undermine the force and effect of Section 332, clearly a result contrary to congressional intent.

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[18] Section 253(a) states, in relevant part, that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a).

[19] 47 U.S.C. § 253(e).

[20] It is also important to note that while interconnection agreements require prior state approval under Section 252, states must do so in accordance with the regulations established by the Federal Communications Commission under Section 251. 47 U.S.C. § 252(e)(2)(B).

Under familiar preemption doctrine, the 1993 legislation presents an easy case. Preemption, which is a matter of congressional intent,[21] may be express in the terms of a statute,[22] it may be implicit when pervasive federal regulation occupies a field,[23] or it may come about when state and federal laws "actually conflict."[24] State regulation here would create an actual conflict to the extent that it is impossible for the Commission to achieve effective interstate regulation in the face of varying state rules on interconnection compensation.[25] But that issue need not be reached because it surely is clear that §332(c)(3), titled "State preemption", expressly removes state authority over entry and rates and has the federal government occupy the field. There is, of course, nothing novel about federal regulation of intrastate matters that affect the nation as a whole; it was a power recognized by the Supreme Court in the historic case of *Gibbons v. Ogden* in

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[21]Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 604 (1991).

[22]*Id.* at 605.

[23]*Id.*

[24]*Id. See generally* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 479 - 501 (2d ed. 1988).

[25]*See* Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 375, n.4, and cases cited therein. *See also* People of the State of California v. Federal Communications Commission, 1996 U.S. App. LEXIS 1234 (9th Cir. January 31, 1996).

1824,[26] and applied by the Court to agency regulation of intrastate rates in *The Shreveport Rate Cases* in 1914.[27] Federal Communications Commission regulation of interconnection rates between commercial mobile radio service providers and local exchange carriers thus carries out congressional intent in a manner fully consistent with our constitutional traditions.

II

A full understanding of the Commission's power and obligation to carry out the 1993 amendments to the Communications Act requires an analysis of the United States Supreme Court's 1984 decision in *Chevron v. Natural Resources*

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[26]22 U.S. (9 Wheat.) 1 (1824). Indeed, not only did Chief Justice Marshall's opinion confirm federal power over internal state laws that affect interstate commerce, but the same outcome was reached in Justice Johnson's concurrence, a remarkable result in light of Johnson's Jeffersonian heritage. *See* Stone, et. al, CONSTITUTIONAL LAW lxv (2d ed. 1991).

[27]234 U.S. 342 (1914). United States v. Lopez, 115 S. Ct. 1624 (1995), which found no congressional power to regulate the mere possession of a firearm in a school zone, is not to the contrary. The Court in *Lopez* stressed that the statute there had "nothing to do with 'commerce' or any sort of economic enterprise...." *Id.* at 1630 - 1631. The Court noted that Congress retained the power to regulate intrastate activities with a substantial affect on interstate commerce, and it explicitly reaffirmed *The Shreveport Rate Cases*. *Id.* at 1629 - 1630.

Defense Council.[28] For if there is any doubt about the Commission's authority in this area, *Chevron* resolves that doubt in the Commission's favor.

Chevron is widely recognized as one of the most important decisions in modern administrative law.[29] The heart of the decision is the Court's recognition of the vital role that administrative agencies properly play in making policy that gives life to congressional enactments:

> In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies....
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail....[30]

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[28]467 U.S. 837 (1984).

[29]*See, e.g.*, Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990); Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992).

[30]467 U.S. 837, 865, 866 (footnotes omitted).

Chevron has particular relevance when an agency's decision is to preempt state law.[31] The interconnection matter at issue here is an important part of the Commission's overall goal of giving life to the congressional mandate to nurture an efficient and effective nationwide communications system. Under the circumstances, the agency's decision to preempt is entitled to particular deference in the courts. As the leading study of the intersection of *Chevron* and preemption found, "preemption entails a close and nuanced analysis of the regulatory scheme in action to determine whether state law prevents the federal scheme from 'being all that it can be.'"[32] The study concluded that in deciding the question of whether Congress intended a statutory scheme to displace state regulation, the courts should defer since "the agency is the better decision-maker to implement that intent."[33]

The practical reasons for this conclusion become all the more clear when one considers what would happen if the Commission remained silent and the industry

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[31]*See, e.g.*, Paul E. McGreal, *Some Rice With Your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 CASE W. RES. L. R. 823 (1995).

[32]*Id.* at 884.

[33]*Id.*

faced undiminished state regulation of interconnection rates. As technology develops, not only will the rates themselves hamper the growth of modern communications, but costly litigation could arise as out-of-state companies that believe they are the victim of discriminatory treatment by state regulators raise dormant commerce clause claims in federal court.[34] Litigation in this area is complex and often unpredictable, since it forces the courts to decide, given the absence of federal action, whether state laws, standing alone, have a discriminatory impact on interstate commerce.[35] Federal preemption, of course, eliminates all dormant commerce clause issues.[36]. And this is surely for the best. As the leading scholarly analysis in the field has found, courts are much less well equipped than agencies to create a vibrant national market: for reasons of expertise, information

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[34]The possibility of such discrimination here is foreshadowed by Congress' insistence in §332(c)(3)(A) that the Commission only approve state rates that are not "unreasonably discriminatory." 47 U.S.C. §332(c)(3)(A).

[35]*See, e.g.*, Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L. J. 425 (1982).

[36]On the intersection of the dormant commerce clause, preemption, and *Chevron*, *see* Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONSTITUTIONAL COMMENTARY 395 (1986).

gathering ability, and democratic accountability, agencies are far better at making interstate commerce policy than are the courts.[37]

Interconnection rates should not be left to the states or to the federal courts. Preemption of those rates is the lawful and appropriate course for the Federal Communications Commission.

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[37] *Id.* at 407, 408.